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SUBJECT: EU TREATY OF LISBON - NO MORE PILLARS; A SINGLE LEGAL
PERSONALITY

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SUMMARY

¶1. With the entry into force of the Treaty of Lisbon (targeted for 2009), the current three-pillar structure of the EU will formally disappear. EU policies concerning economic integration, the Common Foreign and Security Policy (CFSP) and the area of freedom, security and justice will all be brought under a single legal framework, although the specificity of CFSP, including defense policy, will be retained through the maintenance of specific decision-making rules. The "Union" will replace and succeed the European Community (currently a subset of the EU), thus giving the EU as such the status of legal personality, which is only conferred until now upon the European Community and EURATOM. This recognition will not, by itself, entail any extension of the Union's powers. However, it will allow the EU to sign treaties and -- subject to the Member States' agreement -- become a member of international organizations. Though all implications will only appear over time, our preliminary analysis suggests that the conferral of legal personality could bolster the EU's profile at the international level.

¶2. This message, building on previous USEU reporting on the Treaty of Lisbon (REFTELS), is the second in a series that is meant to put forthcoming EU reforms in perspective and describe their impact on the United States' relations with the EU. Other messages will follow that will focus specifically on foreign policy, defense, justice and home affairs, economic policy, and the role of the European Parliament and national parliaments. End Summary.

THE PILLAR STRUCTURE IS ABOLISHED

¶3. A key feature of the failed draft Constitutional Treaty that was retained by the Treaty of Lisbon (ToL) negotiators is the removal of the current three-pillar structure as established under the Treaty of European Union ("Maastricht Treaty") that entered into force in ¶1993. Since then the three pillars -- the "Community" pillar, CFSP and police and judicial cooperation in criminal matters (the bulk of Justice and Home Affairs issues currently forming the "third pillar") -- have been functioning on the basis of different decision-making procedures and legal instruments. Doing away with the pillars implies that "The Union shall replace and succeed the European Community," as stated in the revised Article 1 under the common provisions of the revised TEU.

¶4. The establishment of a single structure as originally designed under the draft Constitutional Treaty could also have implied

getting rid of the special rules and legal instruments that have been created over time for handling the non-Community issues. However, anxious to reaffirm the specificity of CFSP, the ToL negotiators clearly stated that "the Common Foreign and Security Policy is subject to specific procedures defined by the European Council and the Council acting unanimously" (except where otherwise stated) and that "the adoption of legislative acts shall be excluded" from CFSP (article 11.1 TEU). A Declaration annexed to the ToL further clarifies that the provisions of CFSP "do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament" in such matters. In practice, the "second pillar" will thus be maintained de facto with its specific set of decision-making rules.

15. The single framework will allow for the adoption of more decisions using the ordinary legislative procedure (qualified-majority voting in the Council and co-decision with the European Parliament) in areas related to freedom, security and justice that have not been transferred yet to the Community domain, or so-called "first pillar." Visa, asylum and immigration issues are already governed by the "Community method" of decision-making, under which the Commission makes a proposal to the Council and the European Parliament, which eventually adopt it as a piece of legislation. The ToL will pave the way for substantial changes in JHA matters (to be detailed in a separate message), although some specificities and exceptions will be retained here as well, including comprehensive "opt-outs" for some countries that could lead to an increased lack of uniformity in the application of the EU legal order.

THE EU ACQUIRES LEGAL PERSONALITY

16. The issue of the legal personality has long been a subject of debate among scholars and practitioners of the EU. At present, only

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the two remaining Communities - the European Community and EURATOM -- have legal personality. In this sense, legally binding agreements concluded by the EC (European Community) are signed on behalf of one or both of the existing Communities. As an illustration, the WTO Agreement was concluded by the member states individually as well as the European Communities, not by the EU. In the daily practice of international relations, non-EU states are interacting with two organizations (the Communities) and a third entity, the EU, which is often seen as encompassing the EC and the Member States when acting collectively in an area of member state competence. The EU lacks the legal status of the two Communities. This has been a source of confusion that has always been resented -- some would say nurtured -- by EU officials themselves.

17. With the formal removal of the pillar structure and the creation of a single framework, the ToL introduces a single legal personality for the European Union (Article 32 of TEU). By becoming a subject of international law, the EU as such will technically be able to conclude international agreements in all its areas of competence, buy or sell property, go to and be summoned to court, and -- subject to the Member States' agreement -- become a member of international organizations. In other words, the EU - like the EC before it -- will finally be able to take action and assume responsibility on behalf of its Member States.

18. The conferral of the legal personality to the EU will go on a par with a single procedure for the conclusion of international agreements. Under that procedure (detailed in Article 188n of the Treaty on the Functioning of the European Union, or TFUE), the Council authorizes the opening of negotiations on the basis of recommendations from the Commission or (when the agreement envisaged relates exclusively or chiefly to CFSP) the High Representative of the Union for Foreign Affairs and Security Policy. The Council appoints the Union negotiator or head of the EU's negotiating team. The Council may also address guidelines to the negotiator and set up a special committee to be consulted during the conduct of the negotiations. The Council ultimately then also adopts a decision authorizing the conclusion and the signing of the agreements.

¶9. Under the new Treaty, the European Parliament (EP) must give its "consent" ((by a majority of votes cast) to association agreements or those on accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the agreements:

-- Covering areas subject to the ordinary legislative procedure (QMV and co-decision) or the special legislative procedure where consent by the EP is required;

-- Having important budgetary implications for the Union;

-- Establishing a special institutional framework by organizing cooperation procedures.

(In other cases - such as trade cooperation agreement with non-EU countries, the EP is simply consulted. In this respect, the TFUE has only marginally expanded the EP's right of "assent" on international agreements, although the expansion of the co-decision procedure itself potentially expands the EP's role. The above-described procedure does not apply to agreements relating exclusively to CFSP).

¶10. Per Article 6 of the revised TEU, the Union as such will accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The TFEU also provides that accession to the ECHR will be agreed by the Council acting unanimously, with the act concluding the agreement to be ratified by all Member States in accordance with their respective constitutional requirements.

¶11. The single legal personality may also have an impact on the role of EC delegations in third countries that are currently under the authority of the Commission. Subject to practical arrangements to be defined in the months ahead, those delegations (numbering over 120 around the world and managed by Commission DG RELEX) will be placed under the authority of the High Rep for Foreign Affairs and Security Policy, who will combine the responsibilities of the current RELEX Commissioner and the current High Rep for CFSP. This could lead to an assertion of the EU's "institutional image" in the world at large and encourage the heads of those delegation offices to assert a politico-diplomatic profile, e.g. in African and Asian countries.

¶12. To make the EU's mandate clear, a declaration annexed to the ToL states that the legal personality may not "in any way authorize the Union to legislate or to act beyond the competencies conferred

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upon it by the Member states in the Treaties." In other words, legal personality may not lead to calling into question the division of competencies between the EU and its Member States. By implication, the Member States remain free to conclude international agreements within those areas remaining in their exclusive competence, and will be necessary joint participants with the EU in agreements which include provisions touching on areas of joint or exclusive Member State competence.

COMMENT

¶13. The removal of the pillar structure is intended to make the EU constitutional order easier to understand, to provide for better legal certainty and to increase the EU's effectiveness vis-à-vis the outside world. But the first practical effect of this change is to significantly broaden the scope of agreements the EU had been able to enter into, from just those within the competence of the Community (the old "first pillar") to now any agreement falling within the areas of justice and home affairs and common foreign and security policy (although agreements under the latter can only be concluded through unanimity). Though some implications of the reforms described in this message will only appear over time, a preliminary analysis suggests that by conferring legal personality on the EU as such the new treaty will likely enhance the affirmation of the Union's identity at international level, including potentially in the United Nations generally, as opposed to just the UN technical agencies, where the EC is already active as either an

observer or, in a few instances (WTO, FAO), a member.

WOHLERS